Chs81-07

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 81 OF 2007
IN
SUIT NO. 1101 OF 1989

PADAM CHANDRA SINGHI AND ANR ... Plaintiffs

V/S
DR. PRAFULLA B DESAI AND ORS. ... Defendants

PADAM CHANDRA SINGHI ... plaintiff / applicant inperson.
Mr. S. H. Doctor Sr. Advocate with Mr. Pravir Diwan and Ms. J.M. Kotwal i/b. TYABJI DAYABHAI AND CO. for defendant no.1.
Mr. K.A. Setalwad with Ms. E. Menezes i/b. MULLA AND MULLA for defendant no. 7 to 15.

CORAM: **D.G. KARNIK J**.

DATE: March 2, 2007

ORAL ORDER:

1. Heard the plaintiff who appears in person with the leave of the court in this Chamber Summons, and counsel for the defendants.

2. This Chamber Summons is taken out by the plaintiff for recalling of defendant no.1 for further cross examination. In the affidavit in support of the Chamber Summons it is stated

that cross examination of the defendant no.1 was being made by Mr. Mihir Desai, advocate for the plaintiff on 20th September 2006 and it was adjourned as the court time was over. However, in the evening it was noticed that the brief of Mr. Mihir Desai was misplaced and therefore Mr. Desai was not properly prepared on the next date and could not effectively cross examine the defendant no.1 and the cross examination was wound up and closed on the 4th October 2006 in the absence of the brief. The cross examination conducted on the 4th October 2006 was only on the basis of the memory without the advocate having access to his brief. The plaintiff therefore submitted that some questions had remained to be put to the defendant no.1 in his cross examination. The plaintiff has, therefore, prayed for recalling of the defendant no.1 for further cross examination.

3. The request is strongly opposed by the defendant no.1. Counsel for the defendant no.1 submits that Mr. Desai has not filed an affidavit of himself stating that he was in any way inconvenienced in absence of the brief or that he could not effectively cross examine defendant no.1 on account of the loss of the brief. In the absence of affidavit of Mr. Desai, it cannot be held that he was in any way inconvenienced in the cross examination and the cross examination was not concluded effectively. Learned counsel for the defendant

no.1 strongly relied upon the decision of the Punjab and Haryana High Court in Smt. Surinder Kaur vs. Karanbir Singh and anr. , reported in AIR 2004 PUNJAB AND HARYANA 377 and a decision of the Andhra Pradesh High Court, in Botsa Appala Narasayya vs. Smt. Raghunanda Laxmi and ors. reported in AIR 2004 ANDHRA PRADESH, 82. and submitted that the power for recalling a witness under Order 18 Rule 17 of the Code of Civil Procedure (for short C.P.C.) is required to be exercised only in exceptional circumstances and not as a matter of routine. He further submitted that there was nothing exceptional in the present case and therefore the power should not be exercised.

4. Rule 17 of Order 18 of the C. P.C. reads thus:

> "17. Court may recall and examine a witness. - The Court may at any stage of a suti shall recall any witness who has been examined and may subject to the law of evidence for the time being in force put such questions to him as the Court thinks fit."

A bare reading of Order 18 Rule 17 shows that the power to recall the witness can be exercised at any stage of the suit and no restrictions are put statutorily on the power of the court for exercise of the power. None the less the power of recalling a witness cannot be exercised lightly and to fill up

the lacunae that might have been left in the evidence earlier. In Smt. M. M. Amonkar vs. Dr. S.A. Johari reported in AIR 1984 SC 931 the Supreme Court has held that the power to recall a witness under Order 18 Rule 17 or the inherent power under section 151 of the Code of Civil Procedure should not be used to enable a party to fill in the lacunae in the evidence. The power should not be exercised when there is no material on record to warrant the exercise of power. Following the aforesaid decision of the Supreme Court, in Smt. Surinder Kaur vs. Karanbir Singh and anr. (supra), a Single Judge of the Punjab and Haryana High Court held that Order 18 Rule 17 does not permit a party to re- examine or recall any witness to fill in the lacunae in the case. The Andhra Pradesh High Court has also taken a similar view in Botsa Appala Narasayya vs. Smt. Raghunanda Laxmi and ors. (supra).

5. In view of the decisions referred to above it would be necessary to examine whether the facts and circumstances of the case justify exercise of the power under Rule 17 of Order 18 of the C. P.C. for recalling the defendant no.1 for further cross examination. It is not disputed that the brief of the counsel for the plaintiff was misplaced and lost from the court room on 20th September 2006. The case is nearly 20 years old and it is unlikely that the counsel would recall all the

details of the case and would be able to cross examine a party effectively without the brief in his hand. Inability of the counsel to effectively cross examine a party on account of loss of brief from the court room is an exceptional circumstances which, in my view, would justify exercise of the power under Order 18 Rule 17 of the C.P.C.

6. It may also be noticed that the normal rules of evidence have not strictly been followed in this case, perhaps with the consent of the parties. Examination in chief of the defendant no.1 was recorded on 3rd August 2006 on affidavit. Thereafter the co- defendant, i.e. the defendant no.2, commenced his cross examination and put a few questions to the defendant no.1. Being a co- defendant it was proper that the cross examination of the defendant no.1 should have been done by the defendant no.2 first, before the plaintiff cross examined him and that course was rightly followed. However, after putting a few questions, request was made by the defendant no.2 for adjournment. The court could have granted or refused the adjournment. However, perhaps by consent of the parties, a different course was followed. Before allowing defendant no.2 to complete his cross examination the plaintiff was permitted and directed to cross examine the defendant no.1 and accordingly the counsel for the plaintiff commenced the cross examination. Before the cross

examination by the plaintiff was completed the defendant no.2, again with the consent of the parties, was permitted to resume his cross examination of the defendant no.1. On 28th September 2006, the defendant no.2 closed the cross examination and thereafter the plaintiff was again permitted to resume his unfinished cross examination of the defendant no.1. It would thus be seen that the usual course of cross examination of the 1st defendant by a co- defendant first and then by the plaintiff was not followed. The cross examination was interrupted and part of the cross examination was done first by the defendant no.2, then in part by the plaintiff , then resumed by the defendant no.2 and then again by the plaintiff. Though all this appears to have been done by consent of the parties, the course followed was unusual. In the circumstances in my view exceptional circumstances have been made out for recall of the defendant no.1 for further cross examination.

7. For these reasons the Chamber Summons is allowed in terms of prayer clauses (a) and (b).

(D.G. KARNIK J.)